

Before the
Federal Communications Commission
Washington, D.C. 20554

FILED/ACCEPTED
MAR 16 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
)
The Local Newspaper, Inc.)
)

CGB Docket No. 06-181
CC-0653

To: The Office of the Secretary

Reply to Opposition

The Local Newspaper, Inc. f/k/a GE Media, Inc. ("Respondent"), hereby submits its reply to the February 23, 2007 opposition ("Opposition") filed by Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.* ("Commenters") in the above-captioned proceeding. The Commenters filed their Opposition to Respondent's petition for an exemption from the Commission's closed captioning requirements on the basis of undue burden ("Petition"), claiming that the Petition does not provide the requisite evidence necessary to support its request. The Petition, as originally filed, did provide sufficient evidence and the Commission should grant the request. Although not necessary for a grant, Respondent addresses 1) the Commenters' misguided interpretation of the effectiveness of the current legal standard for a waiver of mandatory closed captioning and, 2) the sufficiency of the evidence presented in the Petition.

Discussion

- I. **The Standard for Review of Petitions for an Exemption from Closed Captioning Requirements Established in the *Anglers Order* is Currently Effective**

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Section 713(e) of the Communications Act of 1934, as amended (“Communications Act”) and Section 79.1(f) of the Commission’s rules allow the Commission to grant a petition for an exemption to the closed captioning requirements upon a showing that meeting those requirements would impose an undue burden on the video programming provider or owner. Section 79.1(f)(2) sets forth four factors to be taken into account in determining whether captioning would give rise to an undue burden: (1) the nature and cost of the closed captions for the programming; (2) the impact on operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operation of the provider or program owner.¹ The Respondent’s Petition presented sufficient evidence to meet all four factors of these factors.

In a recent case involving the undue burden standard, similar to the instant case, the Consumer and Governmental Affairs Bureau (“the CGB”) considered the petitions for closed captioning exemptions submitted by two video programming owners, Anglers for Christ Ministries, Inc. and New Beginning Ministries, Inc., in a consolidated Memorandum Order & Opinion.² That decision states that Section 713 and its legislative history “evince that the goal of ensuring that video programming is accessible to those with hearing disabilities must, in certain circumstances, be balanced against the economic burdens that closed captioning requirements present to the providers or owners of such programming” and highlights the existence of statutory categorical exemptions from

¹ 47 C.F.R. §79.1(f)(2).

² See *Anglers for Christ Ministries, Inc. and New Beginning Ministries, Video Programming Accessibility, Petitions for Exemption from Closed Captioning Requirements*, Memorandum Opinion and Order, DA 06-1802 (rel. September 12, 2006) (“Anglers Order”).

captioning for ITFS programming and locally-produced, non-news programming with no repeat value.³ In granting the petitions before it, the CGB stated that it would be “inclined favorably” to grant petitions filed by non-profit organizations that do not receive compensation from video programming distributors for the airing of their programming and that, in the absence of an exemption, may terminate or substantially curtail the programming or other activities important to their mission.⁴

The Commenters, having filed an application for review of the *Anglers Order*, now assert that the Commission may not rely on this standard while the decision is under review. This contention is legally untenable and strains the limits of permissible advocacy. The decision of an administrative agency such as the Commission, with rulemaking and adjudicative powers, binds the affected parties and serves as legal precedent for similarly situated parties going forward. Further, Section 5 of the Communications Act provides that Bureau orders “shall have the same force and effect” as Commission action, under the general authority given to the Commission to delegate its functions.⁵ As to the effectiveness of a non-hearing Bureau order for which review has been sought, a longstanding Commission rule indicates that unless otherwise specified, orders are effective upon release unless the Commission, in its discretion, stays the decision during the completion of its review.⁶ The Commission has made no other specifications with respect to *Anglers Order*, nor did it issue a stay of the decision.

³ See *Anglers Order* at ¶ 7-8.

⁴ *Id.* at ¶ 11.

⁵ See 47 U.S.C. §155(c).

⁶ See 47 C.F.R. §1.102(b)(2) (emphasis added).

Consequently, it is the applicable Commission precedent until such time as it is stayed or overturned by the Commission.

The mere appeal of a Commission order does not trigger an automatic stay, except in certain limited situations, carved out by statute (not applicable here). In the case *Application of WEAM Radio, Inc. and Viacom Broadcasting, Inc.*, the FCC declared and the Court of Appeals for the District of Columbia upheld that, "where an aggrieved party alleges that it will be harmed by the immediate effectiveness of a staff ruling, the appropriate remedy is to seek a stay of that action," a remedy the Commenters did not seek.⁷ Without having undertaken this necessary and rigorous step *and* having received a grant from the Commission, the Commenters may not deny the effectiveness of the standard established in the *Anglers Order*.

In *Melody Music v. FCC*, the Court of Appeals for the District of Columbia held that similarly situated parties should not be subject to disparate treatment.⁸ The Commenters have failed to show how the Petition, and the facts therein, differ from the petitioners and the relevant circumstances described in the *Anglers Order*. As discussed above, the Commenters falsely assert that the Commission may not rely on the *Anglers Order* when deciding whether to grant undue burden petitions. Unfortunately for the Commenters, the opposite is true: *Anglers Order* is the standard by which such petitions

⁷ A party desiring such an outcome must file a Motion for a Stay which meets a four-part test: (1) substantial likelihood of success on the merits, (2) irreparable harm, (3) no substantial harm to others and, (4) a stay would be in the public interest. *See Application of WEAM Radio, Inc. and Viacom Broadcasting, Inc.*, 1985 FCC LEXIS 3308, *6-7(1985), *aff'd. by Committee to Save WEAM v. FCC*, 808 F. 2d 113 (D.C. Cir. 1986).

⁸ *See Melody Music v. Federal Communications Commission*, 345 F. 2d 730, 732 (D.C. Cir. 1965).

must be analyzed. Entities that demonstrate the same “confluence of factors”⁹ as those enumerated in the *Anglers Order* are entitled to be viewed favorably for a grant of their petition.

II. Respondent’s Petition Met the Evidentiary Requirements to Demonstrate an Undue Burden

Respondent’s Petition clearly conforms to the standard set out in the *Anglers Order* and should be granted based on its sufficiency in this regard. Respondent is a non-profit organization, the programming for which it seeks an exemption, Carolina People, is noncommercial, and it receives no compensation from broadcast of the show. In fact, Respondent pays for airtime, as clearly stated in the Petition’s summary of its expenses.¹⁰ Additionally, because adding closed captioning would tax its already tight production schedule and consume the limited production resources, without an exemption, Respondent would be forced to reduce episodes substantially. It should be noted that, in clarifying the scope of the categorical exemption for locally produced, non-news programming, the Commission declared that it “wanted to ensure that our captioning requirements did not prevent the distribution of the most local public interest programming.”¹¹ If Carolina People does not fall within that categorical exemption, to deny the Petition would force a reduction or termination of the show and would clearly defeat the Commission’s goal of preserving most local public interest programming, as articulated in the Order on Reconsideration.

⁹ *Anglers Order* at ¶ 11.

¹⁰ See Petition at 3.

¹¹ See Closed Captioning and Video Description of Video Programming, Order on Reconsideration, 13 FCC Rcd 19,973, 20,000 (1998).

Respondent acknowledges that the captioning costs provided in its Petition represent estimates and that it has not, as of this date, requested figures from captioning providers. However, contrary to the position taken by the Commenters in their Opposition, petitioners seeking an exemption from closed captioning need not make such a solicitation. In the *Anglers Order*, the CGB overruled a prior decision suggesting that soliciting captioning assistance was a precondition to receiving an undue burden exemption.¹²

As previously stated, the Respondent's Petition should be granted as originally submitted. Nevertheless, to facilitate the Commission's processing of the instant matter, Respondent now provides additional financial documentation, further supporting the statements made in the Petition and reiterated here. Attached hereto as Exhibit A, Financials, are: a Statement of Costs for the program Carolina People; a recent invoice issued by the station that airs the programming (WFXB, Channel 43, Myrtle Beach, SC) with a record of all scheduled broadcast dates and the rate per episode; and, an invoice for February charges from the production company with whom Respondent contracts to produce Carolina People. This evidence makes clear that Respondent unquestionably meets the undue burden standard.

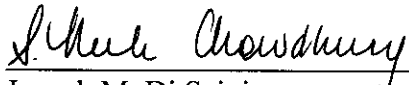
¹² See *Anglers Order* at ¶11.

Conclusion

For the foregoing reasons, Respondent respectfully requests a grant of its Petition and a denial of the Opposition filed by the Commenters.

Respectfully submitted,

The Local Newspaper, Inc.

By: 
Joseph M. Di Scipio
Sima N. Chowdhury

Its Attorneys

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1300 North 17th Street, 11th Floor
Arlington, VA 22209
(703) 812-0511

March 16, 2007

EXHIBIT A

See attached.

Carolina People
Weekly Expenses

| Payee | Purpose | Cost | Notes |
|----------------------------------|------------------------------------|---------------------|--|
| Lucky Dog Productions | weekly fee for production services | \$1153 | |
| FOX43 | airtime | \$1250 | |
| The Herald (Blue Brands, Inc.) | promotional coverage of program | \$553.50 | |
| Personnel and other costs/losses | | \$1800 | includes pay allocated to general TLN, Inc. personnel for program prep |
| | Total weekly | \$4756.50 | |
| | Annualized | \$247,338.50 | |



3364 HUGER STREET
MYRTLE BEACH, SC 29577
(843) 828-4300 PHONE
(843) 828-4343 FAX

ing Address:

CAROLINA PEOPLE
GREG EVERETT
DO NOT MAIL
SC

Advertiser: CAROLINA PEOPLE

Billing Period: 01/08/07-01/28/07

Salesperson/Office: Sieler Pete / WFXB Local Sales

Rev. Type: Cash Direct - Pee Dee

Invoice #

Date: 01/

Contract #

Contract I

Brand: p

Estimate #

Comments:

Time Revenue

| Scheduled | | | | Actual Broadcast | | | | | |
|--------------|---------------------|----------|-------|------------------|-----|----------|--------|------------|----------|
| Days Ordered | Times Ordered | Rate | Spots | Air Date | Day | Time | Length | ISCI/Title | Rate |
| M - F | 07:00 am - 07:30 am | \$250.00 | 15 | 01/08/07 | M | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/09/07 | T | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/10/07 | W | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/11/07 | Th | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/12/07 | F | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/15/07 | M | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/16/07 | T | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/17/07 | W | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/18/07 | Th | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/19/07 | F | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/22/07 | M | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/23/07 | T | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/24/07 | W | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/25/07 | Th | 07:00 am | 28:30 | | \$250.00 |
| | | | | 01/26/07 | F | 07:00 am | 28:30 | | \$250.00 |

Total Scheduled For This Period:

\$3,750.00

15

Billed Spots: 15

Total Gross Billing

\$3,750.00

Agency Commission

\$0.00

Net Due

\$3,750.00

GE MEDIA, INC.
DBA WFXB FOX 43
P.O. BOX 8309 843-828-4300
MYRTLE BEACH, SC 29577

COASTAL FEDERAL
MYRTLE BEACH, SC 29577
67-7236/2532

2/1/07
DATE

CHECK NO.

\$3,750.00
AMOUNT

Fox 43 WFXB

Three thousand seven hundred fifty + no dollars
Greg Everett

Inv # 38820

AUTHORIZED SIGNATURE

LUCKY DOG
TELEVISION PRODUCTIONS

Customer Name **THE LOCAL NEWSPAPER**
Address
City State Zip
Phone Number

Invoice # **13007**

| QTY | Description | Unit Price | Total Amount |
|-----|---------------------------------------|---------------|--------------|
| | PRODUCTION CAROLINA PEDDLE FOR FEB | | \$500.00 |
| | | Total | |
| | | Less Discount | |
| | | | \$500.00 |

Please Make Checks Payable to Lucky Dog Television Productions

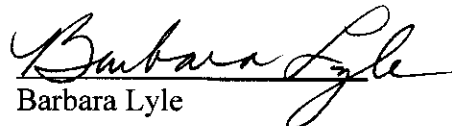
CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary at the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing "Reply to Opposition" were mailed, U.S. first class mail, postage prepaid on this 16th day of March, 2007, addressed to the following:

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